SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 173

IDA PHILLIPS,

Petitioner,

—v.—

MARTIN MARIETTA CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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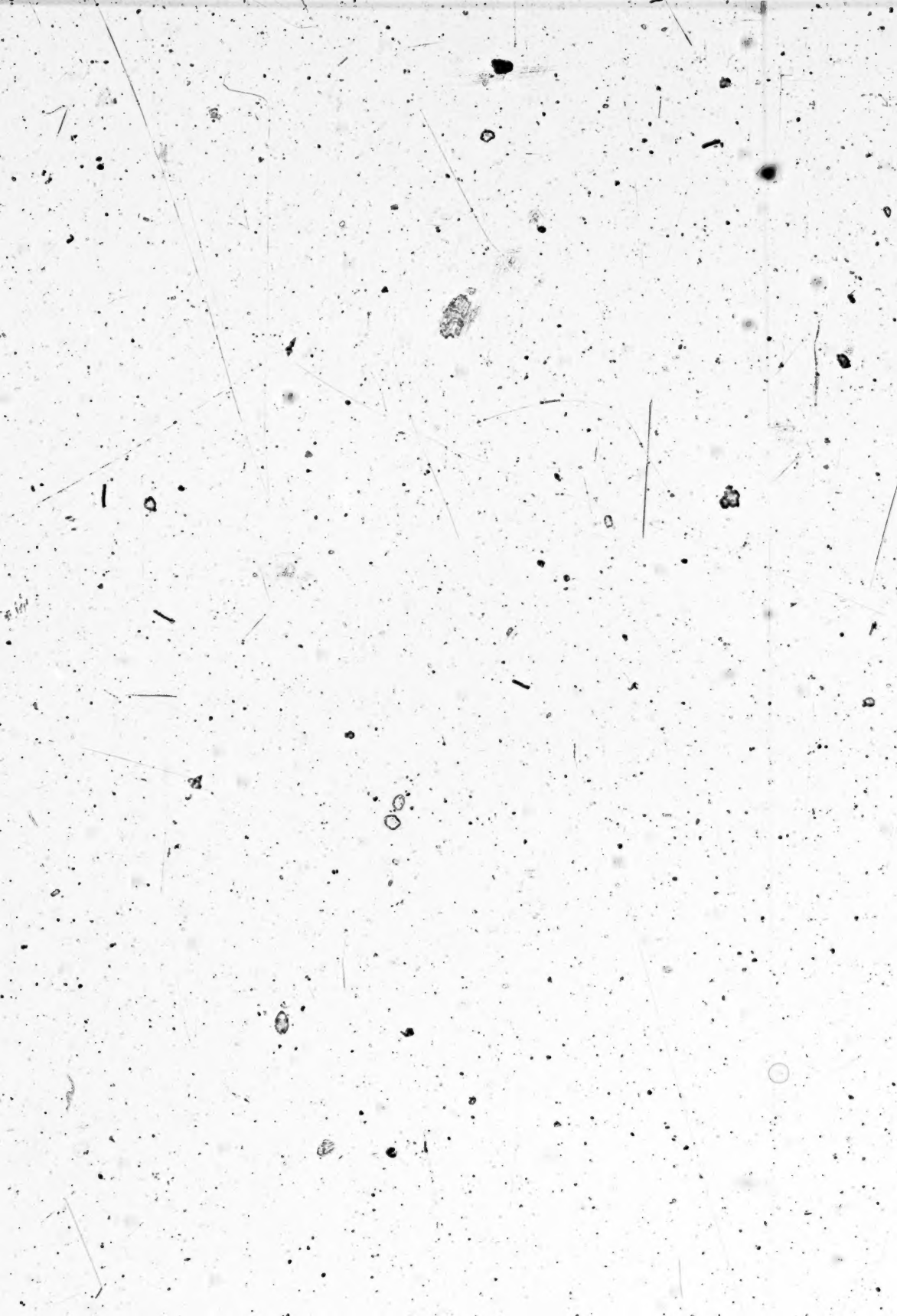

IN THE

Supreme Court of the United States

October Term, 1969

No. 1058

IDA PHILLIPS,

Petitioner,

—v.—

MARTIN MARIETTA CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

ARGUMENT

Pursuant to Rule 24(4) of the Rules of the Supreme Court, Petitioner submits this reply brief addressed to certain arguments that are raised for the first time in Respondent's brief.

A. *The Timeliness of the Petition for Certiorari.*

Respondent contends that the petition for certiorari was not filed on time. This contention is wholly without merit. The period for petitioning for certiorari from a civil judgment of a United States Court of Appeals is governed by 28 U.S.C. § 2101(c) which provides in part that:

> Any . . . writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.

The judgment in the present case was entered on May 26, 1969 (A. 39a). On July 29, 1969 (well before the deadline for applying for a writ of certiorari), the Clerk of the Fifth Circuit sent a letter to all counsel stating that the mandate was being recalled, and that at the request of one of the active judges on the Court the parties were requested to file briefs "with respect to the issues decided in the Court's opinion of May 26, 1969 with particular reference to the standard to be applied under the statute forbidding discrimination because of sex." (A. 40a-41a) In response to this request, Petitioner filed a Supplemental Brief on August 15, 1969 and Respondent filed its Supplemental Brief on August 18, 1969, both within the deadline for a certiorari petition.

On October 13, 1969 (more than 90 days after the entry of judgment), the Court of Appeals in a *per curiam* opinion stated:

> The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), Rehearing *En Banc* is also denied. (A. 42a-43a).

Chief Judge Brown, together with Judges Ainsworth and Simpson, dissented from the Court's failure to grant the rehearing *en banc* and filed an opinion that took issue with the Court's disposition of the substantive issues involved

in the case (A. 43a-52a). The mandate was re-issued on December 11, 1969 (A. 39a).

Petitioner filed her petition for certiorari on January 10, 1970, less than 90 days after the Fifth Circuit's *per curiam* opinion denying a rehearing *en banc*. Respondent's brief in opposition never suggested that the petition was untimely, and on March 2, 1970 this Court granted a writ of certiorari (A. 55a). Petitioner then filed her brief, and Respondent replied in a brief that contended for the first time that the petition for the writ had not been filed on time. Respondent argues that the 90-day period for filing the petition ran from the entry of judgment by the Court of Appeals on May 26, 1969, rather than from the Court's order denying a rehearing on October 13, 1969. This position, however, is contradicted both by prior decisions of this Court and by common sense.

It is well established that:

> "A timely petition for rehearing tolls the running of the three months period because it operates to suspend the *finality* of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942) (emphasis added).[1]

In both civil and criminal cases, the time to file a petition for certiorari runs from the denial of a timely petition for rehearing. See *United States* v. *Healy*, 376 U.S. 75, 78 (1964); Stern & Gressman, *Supreme Court Practice* 248

[1] At the time of the *Pink* decision, the period for petitioning for certiorari was 2 months from the entry of judgment in the court below. When the Judicial Code was revised in 1948, this period was changed to the present 90 days.

(4th ed. 1969). A timely motion to amend the judgment also tolls the time to apply for certiorari, *United States* v. *Adams*, 383 U.S. 39, 41 n. 1 (1966); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944); *Stern & Gressman, supra* at 249-50; and even in the case of an *untimely* petition for rehearing, "where the court allows the filing [of such petition] and, after considering the merits denies the petition, the judgment of the court as originally entered does not become *final* until such denial, and the time for appeal runs from the date thereof." *Bowman* v. *Luperena*, 311 U.S. 262, 266 (1940) (emphasis added).[2]

The cases above stand for the proposition that the period for petitioning for certiorari must be postponed until the judgment of the court below becomes *final*.[3] Where a timely petition for rehearing is filed with the Court of Appeals, or an untimely petition is allowed, the judgment cannot be considered sufficiently final because of the possibility that it will be modified or reversed, thus altering the issues to be presented to this Court, and/or switching the roles of the parties on appeal. With this possibility, "It would be senseless for [the Supreme Court] to pass on an issue while a motion for rehearing is pending below. . . ." *United States* v. *Healy, supra*, 376 U.S. at 80; and it would be equally senseless to require a party to petition for certiorari.

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[2] A petition for rehearing tolls the time for applying for certiorari only if that petition is filed within the time allowed to apply for certiorari. See *Conboy* v. *First Nat'l Bank of Jersey City*, 203 U.S. 141, 145 (1906); *Stern & Gressman, supra* at 249.

[3] "[T]he object of the statute [establishing the period for petitioning for certiorari] is to limit the applicant's time to [90 days] from the date when the *finality* of the judgment for purposes of review is established." *Department of Banking* v. *Pink, supra*, 317 U.S. at 268 (emphasis added).

Respondent's brief attempts to distinguish the cases referred to above[4] from the present one by arguing that the rule they establish does not apply when the request for rehearing is initiated by the court itself, as in this case. Respondent implies that such an internal request does not rise to the level of a true request for rehearing. However, Local Fifth Circuit Rule 12 provides:

> *En Banc*
>
> A suggestion for a hearing or a rehearing en banc may be made as provided in Rule 35 of the Federal Rules of Appellate Procedure *or by any judge of the Court in active service on his own motion.* (Emphasis added.)

Thus, an internal request is a fully sanctioned mode of initiating a rehearing. Therefore, the rule extending the time for filing a certiorari petition should apply with equal strength whether it is a party to the action or the Court itself that initiates the request for rehearing. In either case, the request prevents the judgment of the Court of Appeals from being *final* because the Court retains the power to grant a rehearing and modify or reverse its original judgment. While the request for rehearing is pending, the parties should not be required to petition for certiorari since they cannot be certain of the precise issues

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[4] Respondent also relies on *F.T.C. v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1954). This reliance is misplaced, however, since that case did not deal with a request for rehearing (344 U.S. at 210), but rather involved a motion that could only have "prompted the court below to take some further action which [would have] had no effect on the merits of the decision that we are now asked to review in the petition for certiorari." 344 U.S. at 211. In those circumstances, this Court refused to allow the filing of that motion to enlarge the time for petitioning for certiorari. In the present case, by contrast, the request for rehearing was aimed at a reversal *on the merits* of the decision now before this Court.

they will wish to appeal; in fact, the parties cannot even be certain as to which of them will ultimately be the petitioner before this Court.[5]

B. *Other Issues Raised by Respondent.*

Section B of the Respondent's brief is denominated "As to the Merits." This title would seem to indicate a discussion of the substantive issue raised by the petition for certiorari—viz., Whether the sex discrimination prohibition of § 703(a) of the Civil Rights Act of 1964 is violated by a refusal to hire any women with pre-school age children while men of the same class are hired and there is no bona fide occupational qualification to justify this difference in treatment.[6] Respondent's brief, however, hardly addresses itself to this issue, and where it does, is in complete accord with Petitioner's contention that such a refusal to hire women is a violation of § 703. This agreement on the merits is indicated in several places. Thus, Respondent states:

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[5] Moreover, even if Respondent were correct in asserting that only a party's request for rehearing tolls the period for petitioning for certiorari, Petitioner's Supplemental Brief, filed in response to a request by the Court of Appeals, should itself be treated as a petition for rehearing. Petitioner's brief (filed on August 15, 1969, within ninety days of the original judgment) quite clearly asked the Court of Appeals to reconsider its prior decision. The Court accepted this brief and denied a rehearing only after polling all its members; and a substantial dissent on the merits was filed by three judges. On these facts, Petitioner's brief constitutes a petition for rehearing which, though untimely, was allowed by the Court of Appeals. Therefore, the time for petitioning for certiorari was tolled under the rule established in *Bowman* v. *Luperend*, *supra*, and the other authorities cited above.

[6] The government has recently recognized the discriminatory nature of this practice and has taken steps to outlaw it. On June 9, 1970 the Secretary of Labor issued guidelines to assure equal employment opportunity for women employed with government contractors and sub-contractors covered by Executive Order 11246. One of the guidelines states that " . . . an employer must not deny employment to women with young children unless it has the same exclusionary policies for men. . . ." 41 C.F.R. Chap. 60-20. 3(d).

To be sure, respondent defended the judgment before the Court of Appeals and prevailed there. But the highly general theory of the Court of Appeals, which may have been induced by the meager facts of record, may not be capable of defense in a number of the instances postulated by the petitioner and the *amici*. Our further review of the record in this matter leads us to the conclusion that the disposition of the case by summary proceedings in the District Court, at our instance and upon our motion—although defensible—may have created a basis for confusion—and perhaps even distortion—of the important principles of the provisions of the Civil Rights Act of 1964, which prohibits discrimination in employment by reason of sex. Indeed, as illustrated by the briefs of the petitioner and her *amici*, some portions of the opinion of the Court of Appeals may be subject to the construction that the law permits women and men exactly similarly situated with respect to problems arising out of the custody of small children to be treated differently, which we concede the law does not permit. (Res. Br. 27)

Nonetheless, Respondent argues in subsection B1 of its brief that the motion for summary judgment was properly granted by the District Court because:

> there was no evidence in the record of any act of discrimination by the respondent, the closest thing being petitioner's allegation that the receptionist had told her the respondent was not considering applications from women with preschool-age children. . . .
>
> . . . That allegation . . . standing by itself and even taken as true for the purposes of the motion, does not state a claim within the meaning of Section 703(a). Standing alone, the fact that an employer declines to

> offer employment to women with preschool-age children does not constitute a violation of the Act, and to be such, must necessarily be coupled with a comparison of the treatment of males with preschool-age children at the relevant time. (Res. Br. 19)

However, Petitioner did initiate attempts to make just this comparison. On June 26, 1968, Petitioner filed a request for admission from Respondent "that Martin Marietta Corporation now employs males with pre-school age children in the position of Assembly Trainee." (A. 21a.) What Respondent omits to state is that the District Court in granting the motion for summary judgment ruled that such a comparison was "irrelevant and immaterial" to the issue before the Court (A. 23a). That ruling was based on a prior order by the Court striking from Petitioner's complaint the allegation that she had been discriminated against because she had pre-school age children. (A. 14a-15a).

The propriety of the District Court's grant of summary judgment turns upon the propriety of that Court's earlier ruling. Both these actions, and their affirmance by the Court of Appeals, were based on the view that § 703(a) of the Civil Rights Act does not prohibit an employer from refusing to hire women with pre-school age children while hiring men of the same class. Therefore, the question now before this Court is whether the District Court and Court of Appeals properly interpreted § 703(a) of the Civil Rights Act. That question is discussed in Petitioner's brief but conspicuously avoided in Respondent's.

Respondent's brief attempts to distract attention from this fundamental point by attempting to create the illusion that there is uncertainty as to whether the receptionist told Mrs. Phillips that *women* with pre-school age chil-

dren were not being considered; or that *all persons* with such youngsters would not be hired. (Res. Br. pp. 3, 17) The truth is that no such issue exists in this case since Repondent admitted in ¶6 of its Answer that "the receptionist told plaintiff applications from *women* with pre-school age children were not being considered." (A. 16a-17a) (Emphasis supplied)

Respondent asserts, however, that because of the state of the record, "the receptionist's remark cannot and should not be considered as equivalent to a written, formal inflexible company policy that no woman with a living pre-school age child would be employed as an assembly-trainee." (Res. Br. 24.) But the fact is that this remark by the receptionist, whether based on "written" and "formal" instructions or not, *was* the inflexible policy of Respondents because applicants, like Mrs. Phillips, who applied for jobs with Martin Marietta were told by the receptionist (as Respondent admits in its answer) that "women with pre-school age children are not being considered." And there is no merit to Respondent's argument (Res. Br. 24) that the record does not show what response the receptionist, or someone at a higher level in the company, might have made if Mrs. Phillips had pressed her point about what kind of arrangements she had made for the care of the children.

The Court need not speculate as to the response which might have been elicited had Mrs. Phillips done so because the fact is that the receptionist's remarks did not call for the applicant to supply any such additional information. The receptionist categorically stated to Mrs. Phillips that women with pre-school age children were not being considered. That statement certainly was not designed to elicit additional information about any arrangements that might have been made for the care of

pre-school age children; and it is therefore unrealistic to expect an applicant, after being informed of the company's policy, to pursue the matter further either with the receptionist or someone at a higher level.

CONCLUSION

For the foregoing reasons, the writ of certiorari should not be dismissed, and the judgment of the Court of Appeals should be reversed and the case remanded to the District Court with an order that it vacate its grant of summary judgment. While Respondent seems to agree that reversal and remand are the proper course (Res. Br. 27-28),[7] its brief appears to suggest that this remand may be made without this Court's deciding the merits of the question for which the writ of certiorari was granted. That position is of course erroneous, since the only ground for reversal is that the lower courts misinterpreted § 703(a) of the Civil Rights Act. For the reasons advanced in Petitioner's main brief, the District Court should be instructed on remand to conduct further proceedings to determine whether Respondent refuses to hire women with pre-school age children while hiring men of the same class. The District Court should further be instructed that such conduct, if proven, constitutes a violation of § 703(a) of the Civil

[7] The Conclusion to Respondent's brief asserts that the grant of summary judgment by the District Court, and the judgment of the Court of Appeals upholding it, should be affirmed by this Court. That assertion cannot be taken seriously, however, since Respondent apparently agrees that the lower court actions were based on a misinterpretation of § 703(a) of the Civil Rights Act. (See page 7, *supra*.)

Rights Act, and requires the entry of judgment for the Petitioner.

Respectfully submitted,

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